No. 5985

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MARBLE E. BURCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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JURISDICTION

This is an appeal from a judgment based upon special findings of the United States District Court at Sacramento, California, Judge A. F. St. Sure, presiding, enjoining defendant from interfering with the building of a road on Government land in Section 2, T. 30 N., R. 7 E., M. D. M., and requiring appellant to remove fences and other improvements placed by him thereon and finding that the Government is entitled to the ownership, possession and occupancy of the land in controversy.

Question Presented

Appellant enumerates six specifications of error which have been narrowed and regrouped as follows:

1. That the Court erred in denying appellant's motion for judgment at the conclusion of the Government's case in chief based upon the insufficiency of the evidence (Record p. 39, Spec. 1).

2. That the official Land Office survey plat (plaintiff's Exhibit 1) is erroneous, but the Court erroneously assumed it to be correct as a matter of law in fixing the northwest corner of defendant's land which corner is lost or obliterated instead of fixing the same by proportionate measurement (Record p. 41, 42, Spec. 2, 3, 4, 5).

Statement of Case

The Government is the owner of the land in Section 2, T. 30 N., R. 7 E., M. D. M., shown on the official Land Office survey plat. The appellant is the owner of the NW¼ of Section 1 in this township. The strip of land in controversy lies between the east shore line of Silver Lake and the east line of Section 2 which is the west boundary of appellant's land as shown on said plat. The appellant contends that the northwest corner of his land has been lost or obliterated and that therefore he is entitled to re-establish this corner by proportionate measurement which procedure will place the corner in Silver Lake and deprive the Government of the strip of land above mentioned and as shown on the official plat. The Forest Supervisor has established a summer home recreation area on the shores of Silver Lake and proposes to build a road on the strip of land in controversy to these recreation sites. The appellant has built a fence and other improvements

on this strip of land and refuses to vacate so that the road may be built. The Government therefore brought this injunction suit to restrain the defendant and appellant from interference and requiring him to remove all his improvements from the strip of land in order that the Government may proceed with the building of this road.

Summary of Argument

1. The error if any in denying the appellant's motion for judgment at the conclusion of the plaintiff's case in chief was cured by the testimony introduced as appellant's case in chief, but defendant's answer (Record p. 5, 7) expressly by affirmative allegation admits this point.

2. The Court properly disregarded the theoretical proportionate measurement evidence of appellant and in lieu thereof accepted the evidence which retraced the actual survey and corner location in dispute as made by the original surveyor.

ARGUMENT

I

THAT THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT AT THE CONCLUSION OF THE GOVERNMENT'S CASE IN CHIEF BASED UPON THE INSUFFICIENCY OF THE EVIDENCE (RECORD p. 39, SPEC. 1).

This is a case in equity and not one at law. Nevertheless the motion for judgment at the conclusion of the plaintiff's case in chief corresponds to a motion for non-suit. This Court in *Cook et al. v. Klonos et al,* 164 Fed. 529, held:

> "A motion by the defendant at the close of plaintiff's case to dismiss a suit of an equitable nature on the ground that plaintiff has failed to make a prima facie case, under Code Civ. Proc. Alaska, Sec. 378 (Act June 5, 1900, c. 786, 31 Stat. 395), which authorizes the dismissal of such a suit whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed, or any part thereof, like a motion in an action at law for a nonsuit or direction of a verdict on the same ground, admits every fact which the evidence proves, or tends to prove, as well as the facts which may naturally and rationally be inferred from the facts proved."

However that may be the defendant chose not to rely on this motion for judgment after the plaintiff rested but proceeded to put on his own case, and in doing so supplied the defect in plaintiff's testimony if such existed. It is well settled in California at least that under such circumstances the defendant has waived the error or rendered the error harmless.

> "An error in denying a motion for non-suit is harmless where the defect in the plaintiff's testimony is subsequently supplied by the evidence of the defendant."
>
> *Appeal and Error* 2 Cal. Jur. Sec. 610 p. 1025
>
> "If a plaintiff is allowed to open his case for further evidence and supplies the omitted proof, any error in denying a non-suit is harmless. So also where a defendant does not stand on his motion made at the close of a plaintiff's case and afterwards introduces evidence supplying defects in plaintiff's proof, he thereby waives or cures any error in overruling his motion or at least renders any error in denying the motion harmless."
>
> *Dismissal and Non-Suit* 9 Cal. Jur. Sec. 39 p. 564

Appellant states in his brief (p. 7):

> "The witnesses for appellee did not testify that appellant's fence was or is upon Government land or upon any part or portion thereof, and such a legal inference is not deducible from the documentary proof offered by plaintiff or through, or by means of any presumption set in motion by the evidence in this suit."

Paragraph II of the bill is as follows (Record p. 2):

> "II. That the United States is now and has been at all times herein mentioned the owner of all of the Government lands embraced in Township 30 N., Range 7 E., M. D. M., and more particularly of Section 2 in said township and range as delineated and described on the plat of survey officially approved by the General Land Office and the Department of the Interior, all situated within the exterior boundaries of the Lassen National Forest in Lassen County, State and Northern District of California."

It will be observed that the Government claims title to Section 2, Township 30 N., Range 7 E., M. D. M., as delineated on the official plat of survey approved by the General Land Office and the Department of the Interior. This plat of survey was introduced in evidence as Plaintiff's Exhibit No. 1. As delineated on this plat Silver Lake is entirely in Section 2 with the exception of some small area in Section 35, Township 31 N., Range 7 E., M. D. M. The closing corner (the one in controversy here) the northeast corner of Section 2, is not at or in the Lake and the line between Sections 1 and 2 at no place touches or enters the Lake. As testified by W. G. Durbin (Record p. 23), the Government desires to build a road on the east side of Silver Lake between the Lake and the section line.

The defendant answered the bill and admitted the allegations of Paragraph I, II and III (Record p. 5).

It would seem that by thus admitting the allegations in Paragraph II of the bill, the appellant has admitted that there is Government land between the east shore line of Silver Lake and the east line of Section 2, and that the closing corner (northeast corner of Section 2) does not lie nor ever did lie in the Lake or that the east line of Section 2 touched or intersected the shore line of Silver Lake.

In his answer (Record p. 5) appellant avers in answering Paragraph IV of the bill that the road proposed to be built by the Government will run through and be constructed over the land of the defendant in Section 1. Since the Government alleged in Paragraph IV of the bill (Record p. 3) that the road was to be built between the east side of Silver Lake and the east line of Section 2, the defendant admits that this is the strip he claims. In Paragraph III of his answer (Record p. 6, 7) appellant admits that he has built a fence on the strip of land in controversy and claims ownership of the land.

The appellant contends that no proof was offered by the Government witnesses that appellant's fence was on Government land. Since the appellant after the denial of the motion for judgment put on his case, he waived any error in the denial of this motion, if he supplied the proof which he alleges is lacking in the appellee's case in chief.

The defendant and appellant testified that his fence is on the line to the proportionate corner set by his

surveyor in the Lake (Record p. 25); that he figured he kept on his side of the line and did not go on Government land; (Record p. 26) that Cooper, the previous owner had told him to go to the outlet of the Lake and step ninety steps from the Lake and the corner was practically on an old road; (Record p. 26) that the Government made a demand on him in 1925 or 1926 to take the fences down. (Record p. 28); that he did not step off ninety paces on getting that line. (Record p. 29).

The appellant states that his fence is on a line to a corner set by his surveyor in Silver Lake and also that the Government demanded the removal of the fence in 1925 or 1926. By so testifying he admitted that his fence was on land claimed by the Government on the east side of Silver Lake between the Lake and the closing corner (northeast corner of Section 2). He also admits that he did not follow the instructions given him by Cooper, who practically told him that the corner in controversy was not in the Lake but at or on an old road.

Appellant in his brief says (Brief p. 8):

> "The paper or documentary proof offered by appellee namely appellee's exhibit 1, Tr., page 22, and Exhibit 2, Tr., page 24, fails to show at the time mentioned in the Bill of Complaint or at any other time or at all, appellant's land was or now is Government land, or a part or parcel of any land of the appellee."

The plat of survey (plaintiff's Exhibit 1) discloses that the Government owns land between the east line of the Lake and the east line of Lot 1, Section 2, and

that the Lake does not touch any part of Section 1, the closing corner (northeast corner section 2) being clearly removed from the Lake. Appellant's patent embraces the Northwest Quarter of Section 1. Therefore according to this plat which the appellant admits in his answer, there is no conflict between appellant's land and the land of the United States. The trouble arises from the fact that the appellee refuses to abide by this plat which is incorporated in his patent and insists on building his fences to a supposed corner in Silver Lake thus encroaching upon the Government land as delineated on Plaintiff's Exhibit No. 1.

Appellant contends (Brief p. 9) that the only relief that can be granted is a judgment that the fence in dispute be destroyed and an injunction against its rebuilding be had.

The Bill of the United States asks for an injunction for removal of the fence or any other obstruction or improvement and to restain the defendant from interfering with the construction of the road on the east side of Silver Lake. The United States further prays for such further relief as equity may require and that the Court may deem meet.

This Court said in *Cooper vs. United States,* 220 Fed. 867, 870:

> "Now, under the facts distinctly stated in the bill and the answers of the defendants, and the issues naturally growing out of such facts, the relief accorded the government was plainly within the prayer for general relief, although not within any specific demand. This, under the authorities, will support the decree."

> "If a bill states a cause of action entitling the plaintiff to equitable relief on any theory of the case, a court may grant it under a prayer for general relief, notwithstanding other specific relief may be mistakenly prayed for."
>
> *Young & Vann Supply Co. vs. Gulf Ry. Co.,* 5 Fed. (2d) 421, 423.

It is elementary that when a court of equity has jurisdiction it will give complete relief and make a final determination of all matters in controversy embraced within the pleadings.

> "When jurisdiction in equity has properly attached, it extends to the whole case and to all the issues involved, and the court will proceed to determine any other equities existing between the parties connected with the main subject of the suit and give all relief requisite to the entire adjustment of such subject, provided it is authorized by the pleadings."
>
> *Central R. Co. v. Jersey City et al,* 199 Fed 237.
> *Electric Boat Co. vs Lake Torpedo Boat Co.,* 215 Fed. 377.
> *In re Blake,* 150 Fed. 279.

This Court held in *Chanslor-Canfield Oil Co. vs United States,* 166 Fed. 145:

> "Where the legal title to an oil placer mining claim remains in the United States, but defendants, wrongfully as claimed, are in possession and extracting the oil therefrom, equity has jurisdiction of a suit to stop the waste, and having done so, under equity rule 23, will determine the right to possession and grant appropriate relief."

Therefore the Court had full power to determine and adjudicate all questions before it including the right of possession and title and is not restricted to the granting of merely injunctive relief.

Appellant cites the case (Brief p. 9) of *Halley vs Harriman,* 183 N. W. 665, which embraces a situation not existing in the present case. Appellant assumes that no evidence has been introduced by appellee as to the location of the northeast corner of Section 2, overlooking the fact that Plaintiff's Exhibits Nos. 1 and 2 definitely place this corner at a location entirely different from the point selected by appellant.

Appellant argues that his patent can be attacked on only one ground namely fraud, and that he is the owner of 159.22 acres of land bordering on and touching Silver Lake.

This is not a suit for cancellation of patent and the appellee is not attacking the patent or seeking to have it set aside. The vital question here involved is one of boundary. Appellant's claim to land bordering on Silver Lake contrary to the official plat and field notes, and his interference with a legitimate Government activity, precipitated this suit.

II

THAT THE OFFICIAL LAND OFFICE SURVEY PLAT (PLAINTIFF'S EXHIBIT 1) IS ERRONEOUS, BUT THE COURT ERRONEOUSLY ASSUMED IT TO BE CORRECT AS A MATTER OF LAW IN FIXING THE NORTHWEST CORNER OF DEFENDANT'S LAND WHICH CORNER IS LOST OR OBLITERATED INSTEAD OF FIXING THE SAME BY PROPORTIONATE MEASUREMENT (RECORD p. 41, 42, SPEC. 2, 3, 4, 5).

Appellant in grouping and discussing his assignment of errors 2, 3, 4 and 5 contends (Brief p. 12) that the trial court assumed as a matter of law the official plat was conclusive against appellant in utter

disregard of the original field notes. This contention is believed to be unfounded.

The findings and decree of the court were based on the entire evidence submitted not exclusively upon the official plat. As will be shown, the evidence supports and justifies the findings and decree.

> "The findings of the trial court, on matters in dispute, are presumptively correct, even in equity."
>
> *U. S. vs Board of Missions,* 37 Fed. (2d) 272
>
> "Though on an appeal in an equity suit the evidence is reviewed *de novo,* nevertheless findings of chancellor are presumptively correct, and should be accepted unless a serious mistake had been made in consideration of the evidence."
>
> *New York Life Ins. Co. vs Griffith,*
> 35 Fed. (2d) 945

We agree with the rules laid down in the cases quoted from and cited in appellant's brief page 13. These rules are well known but we do not agree with appellant's application of these rules to the evidence in this case.

The question in this case is the location of the west line of Section 1, T. 30 N., R. 7 E., M. D. M., and the closing corner to Sections 1 and 2 in this township on the Standard Parallel. The defendant contends that this line cuts Silver Lake and that the proper location of the closing corner is in the Lake.

The defendant's surveyor, Bragdt, placed this corner out in the Lake about 35 links or 23 feet, arbitrarily using the proportional method in relocation and running the line 300 feet through the water in spite of

the evidence before him as to the true location of this corner.

The official plat in evidence in this case clearly shows that Silver Lake is entirely in Section 2, T. 30 N., R. 7 E., with some small area in Section 35, T. 31 N., R. 7 E., M. D. M. The closing corner between Sections 1 and 2, T. 30 N., R. 7 E., is not at or in the Lake and the line between these Sections at no place touches or enters the Lake.

Sandow's field notes gives the distance to Silver Lake from the corner of Section 35, T. 31 N., R. 7 E., as 22.65 chains and places the closing corner to Sections 1 and 2 at 21.15 chains from the corner of Sec. 35 this places the closing corner 1.5 chains east of the Lake. As indicated by the notes, these distances were on the true line between the section corner of Section 35 and the quarter corner on the south line of Section 35, and not on the random line. In running the line north between Sections 1 and 2 Sandow did not intersect the shore line of Silver Lake. It will be observed that in running west from the corner of Section 35 he *mentions* intersecting the shore line of Silver Lake at 22.65 chains. Furthermore, in setting the closing corner he marked two witness trees of larch which is also called lodge pole pine. Sandow's notes are particularly significant at this point where he says "From which bears a larch 5 ins. dia. S. 62° W 9 links." This places one of the witness trees about 6 feet southwest of the corner and between that corner and Silver Lake.

Now if Sandow placed the closing corner in the Lake, certainly he would not have had witness trees, one of

which is between the corner and the Lake, and furthermore he could have had no witness trees at all in the position he notes. If the corner had been on the water line of the Lake he could not have had a witness tree S. 62° W 9 links since in that case the tree would have been in the water where trees do not grow. In addition, if the corner had been at or in the Lake Sandow in running the line north between Section 1 and 2 would have been obliged to touch or intersect the shore line. There is nothing in his notes showing this to be the case.

It will also be noted that when Sandow's line on the north from the corner of Section 35 intersected the shore line of Silver Lake at 22.65 chains, he states that the Lake bears *south* and *northwest*. In order for the Lake shore to touch or intersect the section line between Sections 1 and 2, the bearing of the Lake would have to be *southeast* instead of *south*. The distance at the Lake between the random line and the true line is between 30 and 40 feet and if the bearing of the Lake had changed from *south* to *southeast* within so short a distance Sandow would certainly have mentioned it in his notes.

Arthur Bragdt states that he followed Sandow's notes in retracing the lines. He failed to follow the notes so far as witness trees are concerned for those notes clearly show that the closing corner was witnessed by two trees. He, as a surveyor, should know from this that the corner was not at or in the Lake. Evidently he ran out the lines by courses and distances making no attempt to retrace the steps of the orig-

inal surveyor as indicated by the notes and official plat, and arbitrarily adopted the proportional method.

The proportional method in re-establishing missing corners is used where there is no evidence from which the position of the original line or corner can be determined.

> "The rule as to restoring lost corners by putting them at an equal distance between two known corners has no application if the line can be retraced as established in the field. The field notes should be taken and from the corners and distances, natural monuments or objects and bearing trees described therein the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He should endeavor to retrace the steps of the man who made the original survey. If by so doing the line can be located it must be done and when so located it must control."
>
> *County of Yolo vs Nolan,* 144 Cal. 445, 448.
>
> "The proportional method need not be used where the evidence on the ground fixes the position of a corner, regardless of inaccuracy of measurements and errors in distance found in he field notes."
>
> *Weaver vs. Howatt,* 161 Cal. 77, 84; 171 Cal. 302,
> *McKenzie vs Nichelini,* 43 Cal. App. 194,
> *Wilman vs Aros,* 191 Cal. 80.

In this case the plat and field notes agree in placing the closing corner east of Silver Lake. The lands now held by the defendant, Marble Burch, were patented in accordance with the original plat and field notes on file in the Land Office.

> "When lands are granted according to an official plat of their survey, the plat, with its notes,

lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and, so far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant."

Cragin vs Powell, 128 U. S. 691,
U. S. vs State Inv. Co., 285 Fed. 128.

"Reference in patent to plat and field notes incorporates them in such patent."

Foss vs Johnstone, 158 Cal. 119,
Chapman vs Polack, 70 Cal. 487.

The patent in this case provides:

"According to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General."

"It is usually held that these words will constitute a part of the description of the premises conveyed, and limit the purchaser to the tract as marked upon the plat of the Surveyor General."

Boundaries, 4 R. C. L. Sec. 55.

The defendant contends that the field notes do not agree with the plat and that therefore the field notes should prevail. The weight of authority, however, is to the effect that the plat prevails.

"According to the weight of authority if there is any inconsistency between the plat and the field notes, the plat must control. There are, however, some decisions which have adopted the contrary rule."

Boundaries, 9 C J Sec. 143.

A typical case is that of *Haley vs Martin,* 85 Miss 698, 38 S 99, where it was held:

"The grantee of certain lots in a deed describing them by reference to a recorded plat of a survey takes his boundaries under the plat irrespective of the field notes." (Syllabus).

The Court remarked in the course of the opinion:

"It is questionable if any man buying by a recorded map would bother about the field notes."

The rule in California is an exception to the weight of authority.

"In the absence of evidence to the contrary, the map is presumed to correctly represent the survey and the latter need not be looked to but if it be shown that a discrepancy exists between the map and the survey, the latter must prevail."

Whitney vs. Gardner, 80 Cal. 78.

"The case of *Chapman vs Polack,* 70 Cal. 487, is relied upon but it does not support the appellant's position. There the government survey and the map founded upon it agreed and it was attempted to show by private survey that both were wrong. It was very properly held that this could not be done and that the map was conclusive."

Whitney vs Gardner, 80 Cal. 78, 80,
Harrington vs Boehmer, 134 Cal. 196.

The appellant has not pointed out definitely in what respects the plat and field notes disagree. Arthur Bragdt testifies:

"the course of this gravelled trail is directly south 87° 47′, it has varied by 2° 3′ on the west line, and that is his corrected notes as delineated on his map but not in his field notes. When I refer to the map I refer to Exhibit 1 accompanying his field notes, and I had a copy of them; I said that Sandow delineates that corner on his map but does not give it correctly

> in his field notes (Record p. 33). I do not mean to say the map is incorrect; I followed the plat in determining the courses; there is no evidence of any correction as to distances." (Record p. 34)

We gather from this that the map is correct and the field notes wrong, although later Bragdt changed his mind and said he did not accept the map as correct and that it is wrong by the field notes. What we think he really means is that he found the distances to Silver Lake on the ground did not check with those shown on the plat and in the field notes. But corners and distances are controlled by natural monuments as pointed out in appellant's brief (p. 20). We agree with the rules in the cases there quoted and cited relating to the control of natural monuments.

In the present case the east line of Silver Lake is placed by Sandow 22.65 chains on the Standard Parallel from the southeast corner of Section 35. Appellant misses the point. If Sandow intersected the Lake line in going west on the south boundary of Section 35 he would also mention such intersection *if he intersected the Lake line in going north on the line between Sections* 1 *and* 2 *provided the closing corner fell in the Lake.* But Sandow did not mention this Lake on that line definitely showing that he did not go through the water to his corner.

The original record places this closing corner 1.50 chs. Westerly of the Lake shore, with a SE. and SW. bearing tree. No mention of the Lake shore line is made in the record of the line between Sections 1 and 2 closing from the south. It is therefore

absolutely certain that a re-establishment by proportion will not place the corner at even a close approximation of its original position.

As stated previously the Government contends that there is no discrepancy between the plat and field notes so far as the relative location of the closing corner and Silver Lake is concerned. Both show that the closing corner was set by Sandow east of Silver Lake; that the Lake is entirely within Section 2; and that at no place does it touch Section 1.

The defendant is in this case endeavoring by a private survey to put a different interpretation upon the field notes than that adopted by the Government when the official plat was made and filed. This cannot be done.

> "The evidence of a private survey in contradiction of the plats of the surveys of the United States is not admissible."
>
> *Chapman vs. Polack,* 70 Cal. 487, 496.

It will also be noted that neither the plat or Sandow's field notes mention a witness corner. Under the manual of instructions surveyors are required to note the precise relative position of witness corners to true corners and to set witness corners where the position of true corners fall in lakes or swamps. To illustrate the instructions say:

> "Where the true point for a corner falls upon insecure ground, or in an inaccessible place, such as within an unmeandered stream, lake or pond, or in a marsh, or upon a precipitous slope or cliff, a witness corner will be established at some suitable point, preferably on a surveyed line,

where the monument may be permanently constructed."

Manual of Instructions for the Survey of the Public Lands of the United States. Paragraph 250, page 230.

This is further evidence that the closing corner never was set by Sandow in the Lake but at the point shown on the official map.

Appellant quotes from a case (Brief p.20) concerning conflict between map and field notes as to quantity of land in a patent. There is no evidence here that appellant did not receive the amount of land called for and indicated on the plat.

Appellant cites authority (Brief p. 24 and 25) concerning meander corners. Silver Lake is not meandered and there is no question here regarding meander corner.

Appellant argues (Brief p. 28, 29, 30) concerning the position, size and shape of Silver Lake by calculation from the random line run by Sandow and the distance he notes. But the notes show that these distances were on the true line and not on the random line. Appellant also overlooks the fact that Sandow did not encounter the Lake in coming north to the closing corner. As to the size and shape of Silver Lake we believe this to be immaterial, the point being that appellant's northwest corner was not placed in the Lake as claimed by his surveyor. Furthermore appellant has not introduced any evidence that the position, size or shape of Silver Lake has changed since Sandow's survey. The evidence

before the court on that point is that of the official plat.

Appellant states (Brief p. 30) that Sandow in running north to the closing corner "did not make a single reference as to any symbols, natural monuments, blazed trees, or any call for distance to any intermediate points or point from which the locus of Point 4 might be determined."

Regarding natural monuments it is signficant that Sandow mentioned none. This for the reason that he encountered none. But if he placed the corner as claimed by appellant in Silver Lake, Sandow would have had to go through the water of Silver Lake 300 feet and would have placed a witness corner in accordance with his instructions.

As to blazed trees on or adjacent to the line, these are not ordinarily mentioned in the field notes. Sandow however did blaze the witness trees to this corner and located them with reference to it, absolutely proving that he did not place the corner in the Lake.

Appellant cites the case of *Herrington vs Boehmer,* 134 Cal. 196 (Brief p. 31). In this case the original plat was amended by the U. S. Land Department a year and some months after its approval, to make it correspond to the field notes. The original plat was erroneous in that it showed a tract of land which did not exist as described in the patent. The court says (p. 199):

> "The question in all cases similar to this is, Where were the lines run in the field by the government surveyor?"

It is sufficient to say that no such state of facts exists here as in the Boehmer case (supra). The only question involved here is the location of the obliterated corner.

Appellant contends (Brief p. 31) that his boundaries must conform strictly to the field notes and he is then entitled to that portion of Silver Lake intersected by his west boundary. Both the field notes and plat show that his west boundary never intersected the Lake.

Appellant cites the case of *Staiden vs. Helin,* 79 NW 537, (Brief p. 32) concerning the testimony of eye witnesses as to the location of a corner, and mentions Arthur Bragdt in this connection. This witness did not testify that he saw this corner. The only testimony in any way resembling eye witness testimony is that of the appellant with respect to what Cooper told him. Cooper told him to look for the corner about 90 paces from the lake at or on an old road. Appellant did not observe these instructions probably because it would not conform to his surveyor's proportionate measurement placing the corner in the Lake.

To recapitulate: There are 10 reasons appearing in the evidence why the closing corner cannot be arbitrarily placed in Silver Lake by proportionate measurement.

1. The official plat shows the closing corner not in or at the Lake.

2. Sandow set no witness corner in his original survey.

3. Sandow marked witness trees to identify the location of the corner.

4. Trees do not grow in water.

5. One witness tree is placed by Sandow between the corner and Silver Lake.

6. Sandow did not intersect the shore line of Silver Lake going north to the closing corner on the line between Sections 1 and 2.

7. There is no evidence introduced by appellant that there has been any change in the shore line or size or shape of Silver Lake since Sandow made his survey in 1882. The official plat discloses the correct evidence on this point.

8. Sandow's notes place the closing corner 1.5 chains from Silver Lake.

9. The appellant did not follow the instructions of Cooper his predecessor in title in locating this corner about 90 paces or steps from the Lake on or at an old road.

10. Appellant fails to state that Cooper told him the corner was in the Lake.

From the testimony of Burch and Bragdt it is clearly apparent that they ignored the 10 reasons above stated and now shown by the evidence. They arbitrarily located the closing corner in Silver Lake.

CONCLUSION

In view of the foregoing considerations it is submitted that the insufficiency of evidence claimed by appellant was admitted by his answer and at any rate fully covered by defendant's case in chief; that the actual disputed line and corner was located exactly as contended for by the Government. The Court below is correct in its conclusions and should be sustained.

Respectfully submitted,

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